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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 228

FAYETTE No. 4, INC., and
JAMES M. SHARP, - - - - - - Petitioners,

versus

LEXINGTON TOBACCO BOARD OF TRADE,
Et Al., - - - - - - - - - - Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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July 19, 1957.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

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October Term, 1956

No. 1128.

FAYETTE NO. 4, INC., AND
JAMES M. SHARP, - - - - *Petitioners,*

v.

LEXINGTON TOBACCO BOARD OF TRADE,
ET AL., - - - - - - *Respondents.*

On Petition for Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinions of the Fayette Circuit Court (Apps. A and B of Petition) are not officially reported. The opinion of the Court of Appeals of Kentucky (App. C of the Petition) is reported at 299 S. W. 2d 640.

JURISDICTION.

Petitioners invoke jurisdiction under 28 U. S. C., Section 1257(3); but their position is not well taken. The only United States statute involved is the Tobacco Inspection Act, 7 U. S. C., Section 511, *et seq.* Its validity was *not* drawn in question, and could not have been in view of Currin v. Wallace, 306 U. S. 1, holding the Act constitutional.

Petitioners' contention that they have been denied some right, privilege or immunity specially set up or claimed under the Constitution or statutes of the United States is equally untenable. Two regulations of respondent, Lexington Tobacco Board of Trade, a private, non-profit corporation, are involved. One fixes a minimum floor space per basket of tobacco on the warehouse floor. The other requests that driveways below floor level not be used as selling space. No contention is made that either regulation violates the Tobacco Inspection Act. Petitioners claim that these regulations deprive them of their property without due process of law in violation of the Fourteenth Amendment. Such claim is nebulous and insubstantial. These regulations are uniform, reasonable and non-discriminatory. They are necessary for the maintenance of an orderly market. They are the acts of a local Board of Trade, a private corporation, not a State agency. They were approved by the trial court and the Kentucky Court of Appeals after a full and fair hearing. The Fourteenth Amendment provides:

> "* * * nor shall any state deprive any person of life, liberty or property, without due process of law; * * *."

It has been recognized that private, as distinguished from State, action is not inhibited by this Amendment:

> Mason v. Hitchcock, 108 F. 2d 134, 1st Cir.;
> Davidow v. Lachman Bros. Inv. Co., 76 F. 2d 186, 9th Cir., and cases therein cited.

So, even if the regulations of the Board of Trade had deprived petitioners of some property right (which they did not do), this would not be a violation of the Fourteenth Amendment. As so well stated by the Kentucky Court of Appeals in its opinion on rehearing (Petition, App. C, p. 38):

> "No merit is found in the contention of appellants that their state and federal constitutional rights have been violated."

THE QUESTION PRESENTED.

The statement of the question in the Petition is not entirely accurate. The question is not whether the Tobacco Inspection Act authorized the Board of Trade to control non-members. The question is whether the Secretary of Agriculture, under 7 U. S. C., Section 511m, is authorized to cooperate with Boards of Trade; and, in so doing, follow the reasonable and non-discriminatory regulations adopted by the Board of Trade to insure the orderly conduct of the tobacco market.

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of the Tobacco Inspection Act, 7 U. S. C., Section 511m, specifically authorizing the Secretary of Agriculture to cooperate with boards of trade, are set out in the Petition, page 4. In setting out the regulations of the Secretary of Agriculture under the Tobacco Inspection Act, Petitioners have omitted the most significant Regulation, Section 29.107, 7 C. F. R. 29.107, which reads:

> "Order of providing service. When tobacco is to be inspected, sampled, or weighed upon request, such services shall be rendered as far as practicable in the order in which applications were received. In conducting mandatory inspection, the inspection shall start at the beginning of the 'break' in the auction warehouse where the sale is scheduled to start and the inspection shall continue in the order of sale on each warehouse floor and from warehouse to warehouse."

STATEMENT.

Petitioners' statement requires amplification and clarification. The Lexington Tobacco market is a mandatory market under 7 U. S. C., Section 511d. Therefore, all tobacco sold thereon must be inspected.

The Secretary of Agriculture has assigned five inspectors or graders to Lexington. The buying companies furnish five sets of buyers. Thus five auctions can be conducted simultaneously in five separate ware-

houses. When one warehouse is inspected and sold, the graders and buyers move to the next house in rotation.

In order to determine when a sale shall start in each warehouse, how long such sale shall continue, and when the sale shall end and the graders and buyers move to the next house in line, in accordance with Regulation 29.107, it is necessary that (a) the order of sale, and (b) the number of baskets to be sold at each warehouse be established. To determine the number of baskets to be sold, the space per basket must be fixed.

Prior to 1937, the tobacco auction market in Lexington had become disorganized and was not able to render efficient or satisfactory service either to farmers who produced tobacco or to the buyers. In 1937, in order to provide a more orderly and efficient market and render improved service to both producers and purchasers, a group of warehousemen, including petitioner, Fayette No. 4, Inc. (then known as Farmers Tobacco Warehouse Company), organized the Lexington Tobacco Board of Trade. Petitioner was a charter member thereof.

Thereafter, the Board of Trade duly set up the rotation of sales for the warehouses on the Lexington market for each successive sales season, and the rotations so set up were followed by all warehouses.

As a result of the organization and operation of the Board of Trade, the Lexington market became orderly and efficient, capable of rendering highly qualified and satisfactory service to both sellers and buyers of leaf tobacco. Uniform regulations and orderly ro-

tation of sales are absolutely necessary to preserve the efficiency of the market and to enable farmers and buyers to receive the service to which they are entitled (Tr., pp. 466-7, 622-3, 647, 666-671, 724).

At a meeting of the Board of Trade on November 11, 1946, at which meeting petitioner, then a member of the Board, was present, the spacing of tobacco in Lexington warehouses was fixed at 6 feet by 6 feet, or 6½ feet by 5½ feet, for each basket, and such spacing has been followed on the Lexington market since said date (Tr. 531 *et seq.*).

On November 21, 1953, at a meeting of the Sales Committee of the Board of Trade, at the request of purchasers of tobacco, a motion was passed that all buying companies and the grading service be written a letter requesting that they not follow sale or grade tobacco which is set out in driveways below regular floor levels, which driveways are used for normal farmer truck traffic or company drays (Tr. 502).

The regulation as to basket space was necessary to fix the basket allotment and to prevent crowding of tobacco on the warehouse floors. The regulation as to driveways was adopted at the request of the buying interests, because of the snow, mud, etc., that accumulates in driveways and the congestion caused by using such driveways as sales areas. The regulations applied uniformly to all warehouses, and were found by the trial court, after lengthy testimony, to be reasonable and non-discriminatory. On appeal to the Court of Appeals of Kentucky, petitioners abandoned

their claim that the regulations were in any way discriminatory.

In the trial court one of petitioners' chief complaints related to rotation of sales and combinations of warehouses; but this complaint has now been abandoned. Three warehouses were appellants in the Court of Appeals, but only one is petitioner here.

In effectuating the purposes of the Tobacco Inspection Act, the Secretary of Agriculture is authorized to act independently or to cooperate with other agencies of the Government, boards of trade, chambers of commerce or other organizations (7 U. S. C., 511m). It is within the discretion of the Secretary to determine the method which will best effectuate the purposes of the Act and benefit the public interest. The Secretary has traditionally cooperated with all local tobacco boards of trade with respect to the conduct of burley auction sales. Experience has shown that such cooperation has promoted orderly marketing, resulted in bona-fide auction sales at allotted times and places, eliminated confusion and controversy, and has contributed to efficient inspection service. The inspection service is free and is rendered for the benefit of producers and the market as a whole. Where there are numerous warehouses in a market, it is necessary to allocate the inspection service among them on a reasonable and equitable basis. For these reasons, the local group operational plan is of inestimable benefit to the United States in performing the services required by the Act. Prior to cooperation with such local groups the Secretary or his representative exam-

ines the plan from the standpoint of equitable treatment of all groups, both producers and warehouses, and determines whether such plan would result in orderly marketing and effectuate the purposes of the Act. The floor space method of establishing the equitable share of each warehouse in the selling time allocated, and the drawing for priority or order of sale by the warehousemen is the generally accepted practice throughout the burley tobacco belt in such group operational plans. After determination by the Secretary, or his representative, that the group operational plan under consideration is equitable and cooperation with such group will result in orderly marketing and effectuate the purposes of the Act, official inspectors are made available to inspect the tobacco to be sold at auction under such plan. Such a determination was made with respect to the plan of the Lexington Tobacco Board of Trade. (Affidavit of Stephen Wrather, Director of Tobacco Division, Agricultural Marketing Service, Tr., pp. 428-435.)

In their complaint in the trial court, petitioners attacked:

(1) the regulation as to basket space;
(2) the rotation of sales; and
(3) the allotment of selling time;

as unreasonable and discriminatory. In a declaratory judgment (R. 95) the court held that since the representatives of the Secretary of Agriculture follow the rules and regulations of the Board of Trade, the Board does to a certain extent control the operation of ware-

houses on the Lexington market; and that such control is legal so long as the regulations are reasonable and are not arbitrary, capricious or discriminatory. The case thereafter came on for trial "on the issues remaining," and the trial court, after extended testimony on both sides, held that the regulations complained of were neither unreasonable, arbitrary, discriminatory nor capricious. A judgment was entered adjudging the regulations legal and dismissing the complaint (R. 128). This judgment was affirmed by the Court of Appeals. This judgment was fully sustained by the testimony, and on appeal no real attack was made on the sufficiency of the evidence.

ARGUMENT.

The issues involved in this case are very limited, and certainly do not warrant review by this Court. Petitioner wants to crowd its customers' tobacco onto the warehouse floor, in violation of the spacing regulation, and thus secure for itself an unfair advantage over the other twenty-seven warehouses on the Lexington market which abide by the uniform spacing. Petitioner also wants to use driveways below floor level, though exposed to snow, mud, dirt and debris, and thus also secure additional selling time at the expense of the others. The Kentucky courts held these regulations to be fair and non-discriminatory. Petitioner wants to chisel a little on its competitors, to the extent of a few baskets here and a few baskets there, and wants this Court to put its stamp of approval on such

unfair tactics and practices. On the merits, there is no error and no basis for review.

The judgment sought to be reviewed was based upon an adequate and independent non-federal ground. This alone would warrant denial of certiorari: Fox Film Corp. v. Muller, 296 U. S. 207. The decision of the Kentucky Court of Appeals was based on implied contract, or assumpsit, which was purely a question of State law.

No federal question was adequately raised in the Kentucky courts. Petitioners' present claim that their rights under the Fourteenth Amendment have been violated was not considered by the trial court in its decisions either on the motion for summary judgment (Petition, App. A) or on final submission (Petition, App. B). It was not considered by the Court of Appeals until petitioners belatedly attempted to raise it in their Petition for Rehearing (Petition, App. D), and in overruling such petition this claim was found to be without merit and was disposed in one short sentence at the end of the opinion. Certainly no substantial federal question was ever adequately raised in the State courts, and none is raised here.

Moreover, even if a federal question had been raised in the State court, consideration thereof would have been precluded by the judgment of the United States District Court for the Eastern District of Kentucky, holding that no such question was presented. Before filing the present suit, petitioners brought an almost identical action in said District Court, against the Board of Trade and others, claiming that the exact

regulations now attacked violated their federal rights. The District Court dismissed the complaint, holding no federal question was presented. This judgment became final, and no appeal was prosecuted therefrom. This judgment is *res adjudicata* if any federal question is involved in the enforcement of these regulations (R. 87).

Neither the Secretary of Agriculture nor his subordinates in the Tobacco Inspection Service are parties to this suit. If their action in cooperating with the Board of Trade and following its regulations constitutes the alleged violation of petitioner's rights, then there is a fatal defect of parties.

In American Federation of Tobacco Growers v. Neal, 183 F. 2d 869, 4th Cir., it was held that a Tobacco Board of Trade must allot selling time to a non-member the same as to members, on a non-discriminatory basis. That is exactly what Respondent Board of Trade did in the instant case; but petitioners complain that there was no discrimination in their favor. The decisions of the Fayette Circuit Court and of the Kentucky Court of Appeals are in exact accord with Currin v. Wallace, 306 U. S. 1, and with American Federation of Tobacco Growers v. Neal, and there is no conflict warranting the exercise of jurisdiction by this Court.

In the final analysis, what did respondents do that was wrong? Absolutely nothing. The Board of Trade allocated selling time to all warehouses, members and non-members alike, as it was required to do. In order to allot selling time, it had to determine floor space.

This it also did under uniform, reasonable, non-discriminatory regulations. The Secretary of Agriculture, and his subordinates, the tobacco graders or inspectors, followed such allotment as they were authorized to do under 7 U. S. C., Section 711m, and as the inspectors were required to do under Section 29.107 of the Tobacco Inspection Regulations Under such circumstances, the Board of Trade committed no wrong; and petitioner was entitled to no relief. The judgment of the State court was undoubtedly correct.

We respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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July 19, 1957.